

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTHUR FISHER,

No C 05-4383 VRW

Plaintiff,

ORDER

v

MICHAEL J ASTRUE,  
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

\_\_\_\_\_ /

Plaintiff Arthur Fisher brings this action under 42 USC § 405(g) seeking judicial review of the Social Security Administration's (SSA's) final decision denying his applications for both disability insurance benefits and supplemental security income benefits under the Social Security Act (Act), 42 USC §§ 401-33. The parties have filed cross-motions for summary judgment. Doc #13; Doc #14. For the reasons stated herein, plaintiff's motion is GRANTED and defendant's motion for summary judgment is DENIED. The case is remanded for further proceedings.

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I

A

Plaintiff was born on August 5, 1958. At the time of his administrative hearing, plaintiff was five feet four inches tall and weighed approximately 125 pounds. Plaintiff's highest level of education completed was the eleventh grade. He has no specific vocational skills. His occupational history includes work as a laborer for a roofing company, a restaurant waiter, a security guard and, most recently, a temporary worker folding t-shirts.

Plaintiff suffers from a number of ailments. He suffers degenerative arthritis affecting his back, hips and knees; his knees have a tendency to dislocate causing him to fall. He has hepatitis C that was not acute at the time of the proceedings under review on this appeal. Mental impairments include depression and psychotic symptoms of uncertain etiology. The medical records also note cannabis abuse with a possibility of cannabis-induced psychosis. AR 13. Plaintiff's orthopedic conditions limit his exertional activities, including sitting and standing. Plaintiff contends that the combination of his ailments renders him unable to maintain employment. AR 28. Although plaintiff has had recurring dislocation of the knees since childhood, he claims that the onset date of his disability is September 3, 2003. AR 13.

Plaintiff has seen a number of doctors for his ailments and in connection with his applications for disability benefits. Medical records in the record from plaintiff's treating physicians date from January 2000 to May 2004. AR 136-52, 196-218. His primary treating physician during these years was Dr Kenneth Matsumura of the West Oakland Health Center.

1           On October 24, 2003, Dr Walker, an internal medicine  
2 specialist at the James A Watson Wellness Center, examined plaintiff  
3 and completed an "Employability/Medical Statement" to determine  
4 eligibility for food stamps and assistance from the Alameda County  
5 Social Services Agency. AR 219. Dr Walker noted that plaintiff  
6 complained of arthritis in both knees and "chronic" dislocation of  
7 the knees. Id. Dr Walker also reported that plaintiff felt as  
8 though "the Devil" was holding him down while in his sleep. Id. Dr  
9 Walker classified plaintiff as "unemployable" and checked off boxes  
10 stating that plaintiff could not lift even five pounds, reach,  
11 climb, kneel, do knee bends or stand. AR 220.

12           On January 11, 2004, in connection with his application  
13 for social security benefits, plaintiff saw consulting orthopedist  
14 Dr Ray Raven. AR 126-29, 130-35. Dr Raven noted that plaintiff  
15 could stand and walk no more than two hours in an eight-hour day but  
16 that there were no restrictions on the number of hours plaintiff  
17 could be expected to sit in an eight-hour day and that plaintiff  
18 could frequently and/or occasionally lift up to ten pounds. AR 129.  
19 Dr Raven's report found no manipulative limitations in his upper  
20 extremities and did not mention a pinched nerve. The report listed  
21 plaintiff's medications as amitriptyline, diclofenac, benadryl and  
22 vicodin. AR 127.

23           On January 12, 2004, plaintiff saw Dr April Young,  
24 consulting psychologist, for his alleged mental impairments. She  
25 conducted a full psychological evaluation of plaintiff that included  
26 a memory test, an adult intelligence scale test and a visual motor  
27 test. AR 132. Dr Young noted that plaintiff was alert and oriented  
28 during the mental status exam and that he displayed adequate

1 attention and concentration for conversation. AR 132. Dr Young  
2 also noted that he denied past or current use of drugs. Id. To Dr  
3 Young, plaintiff listed his medications as amitriptyline/  
4 perphenazine and diclofenac and stated that he had been taking these  
5 medications for fifteen years. AR 132. After noting that her  
6 results should be "interpreted with caution given the claimant's  
7 variable effort during [the] exam," Dr Young found that plaintiff's  
8 ability to relate to others, including potential co-workers and  
9 supervisors, in an appropriate manner was moderately impaired, his  
10 ability to "maintain the appropriate level of concentration, pace,  
11 and persistence necessary to perform a one or two-step simple  
12 repetitive task [was] unimpaired," but his ability to perform a  
13 detailed or complex task was impaired. AR 134.

14 Dr Young noted that plaintiff told her he had "bad  
15 nerves," disliked loud noises and had episodes during which he felt  
16 pinned down to his bed by "the Devil." AR 132-33. Dr Young  
17 diagnosed plaintiff with psychotic disorder NOS, anxiety disorder  
18 NOS and noted the possibility of cognitive disorder NOS. AR 133.  
19 Dr Young also noted that plaintiff's performance on measures of  
20 intelligence ranged from "extremely low to average" and opined that  
21 he was incapable of managing his supplementary funds in his best  
22 interest at that time. AR 133-34.

23 Among "behavioral observations," Dr Young noted  
24 plaintiff's "gross motor functioning was remarkable for disrupted  
25 gait. Upon rising from his seat, he braced himself in the doorway  
26 and stated that he had been sitting too long." AR 132.

27 From February 28, 2005 to March 4, 2005, plaintiff sought  
28 treatment for depression from the Alameda County Department of

1 Behavioral Health Care Service's Mental Health Division's crisis  
2 program. There, plaintiff admitted using marijuana twice per week.  
3 Plaintiff presented as "depressed, teary-eyed and unable to express  
4 his thoughts." AR 190. He also complained of interruptions during  
5 sleep, hearing mumbling noises at night, seeing lights and feeling  
6 restrained upon awakening. AR 192. Plaintiff was given Zoloft and  
7 Trazodone, two commonly-prescribed antidepressants. AR 189.

8           On April 8, 2005, plaintiff saw Dr Luisito Roxas, a  
9 psychiatrist at the Sausal Creek Clinic, who completed a report  
10 evaluating plaintiff's ability to do work-related activities. AR  
11 221. Dr Roxas noted that plaintiff "seem[ed] to be quite capable of  
12 following instructions." Id. Dr Roxas checked boxes indicating  
13 that plaintiff was moderately impaired in five out of five work-  
14 related mental activities. AR 222. He made note of plaintiff's  
15 reported general discomfort around groups of people and his tendency  
16 to withdraw from such settings. He also wrote that plaintiff "has  
17 reduced cannabis abuse which seems to have created greater energy +  
18 improved mood" and "initial depression symptoms have lifted with  
19 antidepressant meds and recomm of altering [marijuana] use." Id.

20           On April 11, 2005, Dr Matsumura, the treating physician at  
21 the West Oakland Health Center whom plaintiff had seen regularly for  
22 five years or more (see, e g, AR 212), completed a Residual  
23 Functional Capacity (RFC) assessment in which he opined that  
24 plaintiff could stand for less than two hours and sit for less than  
25 six hours in an eight-hour workday, explaining that plaintiff "has a  
26 severe form of degenerative arthritis involving multiple joints,  
27 including knees, hips and back being most symptomatic." AR 224. Dr  
28 Matsumura also noted that plaintiff was "also developing symptoms

1 suggestive of [a] nerve pinch of cervical region — this results in  
2 pain of shoulder.” Id. Dr Matsumura further reported that  
3 plaintiff was limited in his ability to carry out pushing and  
4 pulling activities and was “absolutely” limited in performing  
5 manipulative functions, such as reaching for or handling objects.  
6 AR 225. His handwritten annotation explained that “[a]llthough these  
7 activities may appear to be related only to the hands, actually  
8 entire upper limbs become involved in such activities — therefore  
9 his symptomatology related to cervical disc impairment will likely  
10 worsen.” Id. Dr Matsumura noted that seeing, hearing and speaking  
11 functions were unaffected, but recommended evaluation for  
12 scintillating scotoma, a precursor to migraine headaches, of recent  
13 onset. Id. Of note, the RFC assessment form covered physical  
14 issues only and did not ask Dr Matsumura’s opinion about  
15 mental/psychological RFC issues.

## B

16  
17  
18 On November 12, 2003 plaintiff filed applications for  
19 disability insurance benefits and supplemental security income  
20 benefits giving a disability onset date of September 3, 2003. AR  
21 50-52. The application was denied initially and on reconsideration.  
22 AR 24-27, 30-34. Plaintiff then requested a hearing and the case  
23 was assigned to an Administrative Law Judge (ALJ). AR 37.

24 During the hearing before the ALJ on April 13, 2005,  
25 plaintiff testified that he had worked at the Claremont House as a  
26 waiter sometime during 2002 and had previously worked as a security  
27 guard and a roofer. AR 273. He also testified that he had problems  
28 with his knees, back and shoulders. AR 275. Plaintiff testified

1 that he suffered from "constant dislocation of his knees," which  
2 happened anywhere "from three or four times a week to twice a week."  
3 AR 275-76. Plaintiff also added that when the dislocation happened,  
4 he would fall and "It's like extreme pain for like five, maybe ten  
5 minutes, and then it goes down to an ache and then it swells" and  
6 that his "knees hurt constantly." AR 276. Plaintiff also  
7 complained of lower back pain when sitting for a long period of  
8 time. AR 279. When asked whether he took public transportation,  
9 plaintiff said no, because it was "too hard to get up and down,"  
10 "not safe" and he could not be around "the people, \* \* \* kids on the  
11 bus making noise, laughing, talking []." AR 283.

12           The ALJ asked plaintiff about his "mental problems."  
13 AR 280. Plaintiff testified that the episodes of feeling restrained  
14 and unable to move or speak on awakening as well as hearing voices  
15 in the form of a "mumbling noise" had been present since childhood.  
16 AR 279-80. Plaintiff admitted to using marijuana for medical  
17 purposes and found it effective in reducing the pain in his knees;  
18 specifically, he testified that he used marijuana once or twice a  
19 month only about five times before going to see Dr Roxas. AR 288.

20           The ALJ also heard testimony from Dennis Contreras, a  
21 vocational expert (VE). The ALJ posed a hypothetical question to  
22 the VE describing a worker with plaintiff's age, education and  
23 experience. The ALJ also specified a "combined sit, stand and walk  
24 up to a full eight hour day" with various terrain and postural  
25 restrictions. AR 292. When the ALJ asked what jobs such a worker  
26 could perform, the VE listed four: information clerk, small product  
27 assembler I, general clerk and hand packager. AR 293-95. Only one  
28 of the jobs, information clerk, was listed as "sedentary" in the

1 Dictionary of Occupational Titles (DOT). AR 293. Two of the jobs,  
2 small product assembler I and general clerk, were listed as "light."  
3 Id. The fourth, hand packager, was listed as "medium." Id. The VE  
4 testified, however, that a subset of sedentary jobs was available in  
5 each of these categories. Id. For example, he testified that of  
6 56,000 product assembler jobs in the national economy, there were  
7 380 sedentary positions in the local economy. Id.

8 Plaintiff's attorney also examined the VE in an effort to  
9 determine whether his opinion would vary if (1) mental health and/or  
10 cognitive limitations missing from the ALJ's hypothetical were  
11 included and (2) in accordance with Dr Matsumura's opinion,  
12 plaintiff were limited to six, rather than eight, hours of sitting.  
13 The VE generally responded that if "moderate" mental impairment  
14 meant plaintiff's concentration, persistence and/or pace were  
15 affected 10-20% of the time, employers would tolerate it, but not  
16 more than 20%. AR 300-02. The VE also responded that a very low  
17 range of intellectual functioning would make it difficult for  
18 plaintiff to obtain or maintain employment as an information clerk  
19 or a general clerk. AR 303. Regarding whether a limitation to six  
20 hours per day of sitting would erode an applicant's job base, the VE  
21 responded that "there might be some erosion" but many of the  
22 sedentary jobs were sitting or standing at will. AR 309. He  
23 testified, however, that the need to use a cane when standing would  
24 not be an issue if limited to five minutes per hour. AR 310-11.

25 On June 28, 2005, the ALJ issued a decision, finding that  
26 while plaintiff suffered from degenerative joint disease and  
27 recurrent dislocation of the knees, he was not disabled as defined  
28 by the Act because there were "jobs existing in significant numbers



1 in the national economy that [the] claimant can perform." AR 19-20.  
2 The ALJ relied on much, but not all, of Dr Raven's opinion to  
3 determine plaintiff's RFC, finding him able to sit for eight hours  
4 and stand/walk for less than two hours in an eight-hour day, but  
5 able to climb, stoop, crouch and crawl "on only rare occasions" and  
6 to lift/carry no more than ten pounds.

7 The ALJ did not accord treating physician Dr Matsumura's  
8 assessment controlling weight. AR 16. The ALJ wrote that the  
9 medical evidence did not document clinical findings to support Dr  
10 Matsumura's theory of a pinched nerve in the cervical spine and that  
11 this problem was, in any event, of less than twelve months'  
12 duration. Id. Also, the ALJ determined that plaintiff's  
13 symptomatic and conservative medical regimen was "inconsistent" with  
14 Dr Matsumura's opinion that plaintiff exhibited significantly  
15 diminished functional ability. Id.

16 The ALJ made note of the medical evaluation for the  
17 Alameda County Social Services Agency which concluded that plaintiff  
18 was "unemployable" (supra part I.A), but seemed to discount this  
19 opinion because plaintiff's "reported daily activities also exceed  
20 the functional limitations assessed." AR 16. The ALJ noted that  
21 plaintiff "is able to perform some cooking, shopping, laundry, and  
22 watering plants, \* \* \* read the daily newspaper and play chess." Id.

23 With respect to mental impairments, the ALJ noted Dr  
24 Young's statement that the results of the psychological exam should  
25 be "interpreted with caution given the claimant's variable effort  
26 during the evaluation." Id at 17 and supra. Based on this  
27 statement, the ALJ concluded that the results of the examination did  
28 not reflect plaintiff's actual mental condition. Id. The ALJ made

1 note of Dr Young's mention of plaintiff's fifteen-year history of  
2 taking amitriptyline/perphenazine and diclofenac but did not mention  
3 these medications again in his decision. AR 14.

4 Instead, the ALJ discussed the reports from the Alameda  
5 County Behavioral Health Care Services, Mental Health Services and  
6 determined that they supported a diagnosis of depression which he  
7 found not to have existed for twelve continuous months. AR 17. The  
8 ALJ concluded that plaintiff was "only mildly impaired with regard  
9 to activities of daily living and in concentration, persistence or  
10 pace" and that, socially, he was only "mildly-moderately limited."  
11 Id. The ALJ seized on plaintiff's admission of occasional medical  
12 marijuana use as an explanation for his psychotic and depressive  
13 symptoms:

14 The progress notes show good response and  
15 improvement of the depression symptoms (concurrent  
16 with a decline in cannabis use) to permit work  
activity without significant limitation.

17 \* \* \*

18 At the hearing, claimant testified that he had  
19 smoked marijuana although not on a continuous  
20 basis. This evidence leads me to find that  
claimant's complaints of auditory and visual  
hallucinations can be attributed to the drug  
abuse.

21 AR 17.

22 Regarding plaintiff's credibility, the ALJ acknowledged  
23 "[t]here are certainly medical disorders to account for claimant's  
24 subjective complaints" but found that the "alleged intensity,  
25 persistence and functionally limiting effects of his symptoms are  
26 not entirely credible." AR 18. The ALJ noted: plaintiff's  
27 complaints of lower back pain were not supported by the medical  
28 findings and treatment; the mental symptoms responded to

1 conservative treatment; plaintiff denied drug use to Dr Young, but  
2 later admitted it at the Alameda County Behavioral Health Care  
3 Services. Id. Based on these seemingly inconsistent statements,  
4 the ALJ determined that plaintiff had not been "honest and  
5 forthcoming." Id. The ALJ observed that although the knee  
6 condition had affected plaintiff for "many years," plaintiff had  
7 still been able to work as a "waiter and roofer for extended  
8 periods." Id. The ALJ then concluded that the severity of the  
9 symptoms alleged was "not entirely credible," and found that  
10 plaintiff retained at least some capacity for work. Id.

## II

13 "The findings of the Commissioner of Social Security as to  
14 any fact, if supported by substantial evidence, shall be  
15 conclusive." 42 USC § 405(g). Accordingly, a district court may  
16 overturn a decision to deny benefits only if the decision is not  
17 supported by substantial evidence or if the decision is based on  
18 legal error. Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995)  
19 (citing Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989)). The  
20 Ninth Circuit defines substantial evidence as more than a "mere  
21 scintilla but less than a preponderance; it is such relevant  
22 evidence as a reasonable mind might accept as adequate to support a  
23 conclusion." Id.

24 "Disability" is defined as "the inability to do any  
25 substantial gainful activity by reason of any medically determinable  
26 physical or mental impairment \* \* \* which has lasted or can be  
27 expected to last for a continuous period of not less than 12  
28 months." 20 CFR § 404.1505(a). The ALJ conducts a five-step test

1 to determine whether a claimant is disabled and eligible for  
2 benefits. Step one asks whether the claimant is currently engaged  
3 in substantial gainful activity. If the claimant is not working,  
4 step two considers whether the claimant has a severe medically  
5 determinable impairment that is expected to last more than twelve  
6 months. If so, the next step asks whether the impairment meets or  
7 equals a listed impairment in Part 404, Subpart P, Appendix 1. If  
8 so, the claimant is deemed disabled. If not, step four considers  
9 whether the impairments prevent the claimant from doing his past  
10 relevant work. If the claimant shows that he cannot perform his  
11 past relevant work, the burden then shifts to the government to show  
12 that there are other jobs in the economy that can be performed by  
13 the claimant at step five. 20 CFR § 404.1520, § 416.920.

14  
15 III

16 The court notes at the outset that this is a close case.  
17 If plaintiff is not disabled, he is very nearly so. The medical-  
18 vocational guidelines (known as the "grids") at 20 CFR Part 404  
19 Subpart P Appendix 2 apply when an individual is able to perform the  
20 full range of work at a particular level. Tackett v Apfel, 180 F3d  
21 1094 (9th Cir 1999). The grids do not apply to plaintiff's  
22 situation because (1) he cannot perform the full range of sedentary  
23 work and (2) plaintiff suffers from both exertional and non-  
24 exertional limitations, whereas the grids only apply where "a  
25 claimant's functional limitations fall into a standardized pattern  
26 'accurately and completely' described by the grids." *Id* at 1103.  
27 The introduction to the grid regulations is nonetheless instructive  
28 here to the extent that it addresses the challenges individuals

1 without relevant skills face in transitioning to sedentary work due  
2 to physical limitations:

3 Vocational adjustment to sedentary work may be  
4 expected where the individual has special skills  
5 or experience relevant to sedentary work or where  
6 age and basic educational competences provide  
7 sufficient occupational mobility to adapt to the  
8 major segment of unskilled sedentary work.  
9 Inability to engage in substantial gainful  
10 activity would be indicated where an individual  
11 who is restricted to sedentary work because of a  
12 severe medically determinable impairment lacks  
13 special skills or experience relevant to sedentary  
14 work, lacks educational qualifications relevant to  
15 most sedentary work (e g has a limited education  
16 or less) and the individual's age, though not  
17 necessarily advanced, is a factor which  
18 significantly limits vocational adaptability.

19 20 CFR Part 404, Subpart P, Appendix 2, § 201(c). Plaintiff's  
20 eleventh-grade education is "limited" under the social security  
21 regulations, meaning "not enough to allow a person \* \* \* to do most  
22 of the more complex job duties needed in semi-skilled or skilled  
23 jobs." 20 CFR § 404.1564(c), 416.964(c). Under grid rule 201.17,  
24 were plaintiff able to perform the full range of sedentary work but  
25 illiterate or unable to communicate in English, he would have been  
26 deemed disabled even as a "younger individual" of forty-six in view  
27 of his limited education and lack of specific vocational skills. 20  
28 CFR Part 404, Subpart P, App 2 § 201(g) and § 201.17. Although  
29 plaintiff is able to speak English, this strength appears  
30 counterweighed by the dual burdens of impaired ambulation and  
31 significant, chronic mental health issues. These limitations are  
32 more fully discussed in the following sections.

33 Turning to plaintiff's specific contentions, plaintiff's  
34 appeal argues that the ALJ committed legal error by: (1) not  
35 properly considering whether plaintiff's impairment met or equaled

1 the listings (Doc #13 at 3-4); (2) failing to set forth "legally  
 2 sufficient reasons for rejecting the opinions of Kenneth Matsumura,  
 3 MD, [plaintiff's] treating physician" (Doc #13 at 7); (3) not  
 4 properly considering the "impact [plaintiff's] mental impairment  
 5 would have on the occupational base" (Doc #13 at 7-8); (4)  
 6 improperly discrediting his subjective testimony; and (5) relying on  
 7 testimony by the VE that he asserts was flawed by its reliance on  
 8 jobs in the "medium" and "light" work categories. Doc #13 at 9-13.  
 9 The court addresses each of these points in turn.

10  
 11 A

12 1

13 Plaintiff first contends that the ALJ committed legal  
 14 error by not properly considering whether the knee impairment  
 15 equaled the criteria for disability due to "major dysfunction of a  
 16 joint" in 20 CFR Part 404 Subpart P, Appendix 1. "Major dysfunction  
 17 of a joint" requires:

18 gross anatomical deformity (e g, subluxation,  
 19 contracture, bony or fibrous ankylosis,  
 20 instability) and chronic joint pain and  
 21 stiffness with signs of limitation of motion  
 22 or other abnormal motion of the affected  
 23 joint(s)

24 and

25 findings on appropriate medically acceptable  
 26 imaging of joint space narrowing, bony  
 27 destruction, or ankylosis of the affected  
 28 joints(s)

with

(A) Involvement of one major peripheral weight-  
 bearing joint (i e, hip, knee, or ankle),  
 resulting in inability to ambulate  
 effectively, as defined in 1.00B2b.

20 CFR Pt 404, Subpt P, App 1 § 1.02(A). The Listing defines ineffective ambulation as "an extreme limitation of the ability to walk; i e, an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain or complete activities." 20 CFR Pt 404, Subpt P, App 1 § 1.00(B)(2)(b)(1). Examples of ineffective ambulation "include, but are not limited to":

the inability to walk without use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail.

20 CFR Pt 404, Subpt P, App 1 § 1.00(B)(2)(b)(2). "Effective ambulation" requires that "individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living." Id. Independently walking around one's home without assistive devices "does not, in an of itself, constitute effective ambulation." Id.

The ALJ must find that a claimant is disabled if he determines at step three that he has an impairment that meets or equals one of the listings in 20 CFR Part 404 Subpart P, Appendix 1. 20 CFR § 404.1520(a)(4)(iii). "To meet a listed impairment, a claimant must establish that he or she meets each characteristic of a listed impairment relevant to his or her claim." Tackett v Apfel, 180 F3d 1094, 1099 (9th Cir 1999). "To equal a listed impairment, a claimant must establish symptoms, signs and laboratory findings 'at least equal in severity and duration' to the characteristics of a relevant listed impairment \* \* \*." Id. The ALJ, in his decision,

1 "must adequately explain his evaluation of the evidence and the  
2 combined effects of the impairments." Marcia v Sullivan, 900 F2d  
3 172, 176 (9th Cir 1990).

4 Here, there is no dispute that plaintiff meets one of the  
5 criteria mentioned in Listing § 1.02(A): knees that sublux, or  
6 dislocate, spontaneously. AR 128. It is also undisputed that  
7 plaintiff has not shown any findings on appropriate medically  
8 acceptable imaging of joint space narrowing, bony destruction or  
9 ankylosis of the affected joint(s). The effectiveness of  
10 plaintiff's ambulation, an important issue not specifically  
11 addressed in the ALJ's decision, is discussed below. Plaintiff's  
12 symptoms fail to meet Listing § 1.02, but plaintiff contends on  
13 appeal that the ALJ erred in not considering whether his impairments  
14 equaled the listing.

15 Plaintiff argues that the ALJ's decision did not  
16 adequately explain the ALJ's evaluation of the evidence as required  
17 under Marcia v Sullivan. The court agrees. The ALJ determined that  
18 "[t]he clinical and laboratory findings \* \* \* [did] not meet or  
19 equal any listed impairment of Appendix 1 to Subpart P of Regulation  
20 No 4." AR 253. The ALJ's decision, however, failed to discuss  
21 "equivalence" in determining that plaintiff was not disabled under  
22 the listing. The ALJ also failed to explain his evaluation of the  
23 evidence as required by Marcia v Sullivan on the issue of whether  
24 plaintiff could ambulate effectively.

25 The record is less than clear as to whether plaintiff's  
26 ambulation is effective or ineffective within the meaning of 20 CFR  
27 Part 404, Subpart P, Appendix 1 § 1.00(B)(2)(b). The record  
28 suggests that an ever-present risk of spontaneous dislocation of the



knees attends plaintiff's walking. According to plaintiff's testimony: dislocation occurs spontaneously while he is walking (AR 276); he has difficulty going up and down stairs because of an increased risk of dislocation (AR 284-85); and he does not take public transportation because it is "too hard to get up and down." AR 283. This latter limitation — the inability to use public transportation — is specifically listed among examples of ineffective ambulation in the regulation.

While plaintiff acknowledged his ability to carry out some activities around the house and the ALJ seized on these facts in discounting the medical opinion that plaintiff was "unemployable" (AR 16), the regulations state that the ability to walk around the home unassisted does not alone constitute effective ambulation. 20 CFR Pt 404, Subpt P, App 1 § 1.00(B)(2)(b)(2). Moreover, the Ninth Circuit has held that "the mere fact that a plaintiff has carried on certain daily activities \* \* \* does not in any way detract from her credibility as to her overall disability. One does not need to be 'utterly incapacitated' in order to be disabled." Benecke v Barnhart, 379 F3d 587, 594 (9th Cir 2004).

This court's review of the record indicates that the ALJ ignored important evidence suggesting that plaintiff's difficulties with ambulation were sufficient to equal Listing 1.02 and that remand for more careful review of this issue is required.

2

Plaintiff argues that the ALJ erred in failing adequately to assess the impact of his mental impairments. Doc #13 at 8.

To evaluate a claim of disability based on mental impairment, the ALJ is required to employ a "special technique" at

1 the administrative hearing level to assist in (1) identifying the  
2 need for additional evidence, (2) considering and evaluating the  
3 functional consequences of the mental disorder on the claimant's  
4 ability to work and (3) organizing and presenting the facts. See 20  
5 CFR § 404.1520a(a), 416.920a(a). Applying the special technique,  
6 the ALJ must first evaluate all pertinent symptoms, signs and  
7 laboratory findings to determine whether the claimant has a mental  
8 impairment. If the ALJ determines that the claimant has a  
9 "medically determinable mental impairment," the ALJ must specify how  
10 the claimant's functioning is affected by such factors as chronic  
11 mental disorders, structured settings, medication and other  
12 treatment. The ALJ must rate the degree of functional limitation in  
13 four areas: activities of daily living; social functioning;  
14 concentration, persistence or pace; and episodes of decompensation.  
15 20 CFR § 404.1520a(c)(3). "The last point on each scale represents  
16 a degree of limitation that is incompatible with the ability to do  
17 any gainful activity." 20 CFR § 404.1520a(c)(4). The ALJ then  
18 determines the severity of the claimant's mental impairment(s). 20  
19 CFR § 404.1520a(d).

20 The regulation specifically requires the ALJ to document  
21 use of the special technique in the decision:

22 The decision must show the significant history,  
23 including examination and laboratory findings,  
24 and the functional limitations that were  
25 considered in reaching a conclusion about the  
26 severity of the mental impairment(s). The  
27 decision must include a specific finding as to  
28 the degree of limitation in each of the  
functional areas described in paragraph (c) of  
this section.

20 CFR § 404.1520a(e). A record containing evidence of mental  
impairment allegedly preventing claimant from working requires

1 adherence to the procedures set forth in the regulations for  
2 evaluating the potential mental impairment and requires  
3 documentation of those procedures. Gutierrez v Apfel, 199 F3d 1048,  
4 1051 (9th Cir 2000), quoting Hill v Sullivan, 924 F2d 972, 975 (10th  
5 Cir 1991). An ALJ's failure to complete required documentation when  
6 a colorable claim of mental impairment exists provides sufficient  
7 cause for remand. Gutierrez, 199 F3d at 1051. Only when "no viable  
8 claim of mental impairment" exists does a failure to complete  
9 required documentation not require reversal. *Id.*

10 Here, Dr Young diagnosed plaintiff with psychotic disorder  
11 NOS, anxiety disorder NOS and wanted to rule out cognitive disorder  
12 NOS. AR 133. Dr Young noted that plaintiff complained about "bad  
13 nerves," hearing from the Devil and having episodes where he felt  
14 pinned down to his bed. AR 133. In a subsequent examination at the  
15 Alameda County Department of Behavioral Heath Care Service,  
16 plaintiff complained of interruptions during sleep, hearing mumbling  
17 noises at night and seeing lights. AR 187-88.

18 The record contains several references to plaintiff having  
19 a fifteen-year history of taking amitriptyline and perphenazine,  
20 which plaintiff stated was prescribed by Dr Matsumura. See, e g, AR  
21 95, AR 105. There are no legible treatment notes confirming that  
22 plaintiff received these prescriptions, but the ALJ did not indicate  
23 disbelief or skepticism about plaintiff's use of these medications.  
24 Amitriptyline is a tricyclic anti-depressant. MedlinePlus Drug  
25 Information webpage, National Institutes of Health,  
26 <http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a682388.html>,  
27 consulted 10/1/07. Perphenazine is an anti-psychotic medication  
28 used to treat "schizophrenia and symptoms such as hallucinations,

1 delusions, and hostility." Id at a682388.html, consulted 9/23/07.  
2 Plaintiff was also prescribed antidepressants during an episode of  
3 severe depression in February 2005. AR 189. This evidence gives  
4 rise to a colorable claim of mental impairment. Accordingly, the  
5 ALJ was required to follow the procedures set forth in  
6 20 CFR § 404.1520a/416.920a.

7           The ALJ's compliance with the "special technique" rules  
8 was perfunctory and, in the court's view, insufficient. Although  
9 plaintiff admitted to at most sporadic and recent cannabis use, the  
10 ALJ found that plaintiff's psychotic symptoms were attributable to  
11 "the drug abuse." AR 17. This finding is not supported by  
12 substantial evidence, but rests rather on a comment in a report by a  
13 consulting psychiatrist who saw plaintiff only once. See AR 222.  
14 Given this doctor's lack of a treating relationship with plaintiff,  
15 his report that plaintiff "has reduced cannabis abuse which seems to  
16 have created greater energy and improved mood" appears likely to  
17 have been based on a comment by plaintiff himself expressing such an  
18 opinion -- hardly an appropriate foundation for a determination that  
19 plaintiff's mental health problems are not disabling and of short  
20 duration. Although the ALJ mentioned plaintiff's other psychotropic  
21 drugs in his factual narrative (AR 14), he did not mention them in  
22 his analysis. The decision only discussed cannabis-induced  
23 psychosis, but did not consider the evidence of psychosis from other  
24 causes. To the extent that the ALJ addressed the impact of mental  
25 impairments on RFC, he did so in a cursory manner (e g, "I do not  
26 find that depression further erodes claimant's occupational base" AR  
27 17), and, of note, he included no mental-health-related limitations  
28 in his hypothetical to the VE.

1 In a case in which a claimant has at least one severe  
2 impairment, the SSA is required to consider the limiting effects of  
3 all the claimant's impairments, even those that are not severe, in  
4 determining RFC. It does not appear that the ALJ did so here. 20  
5 CFR § 404.1545(e), § 416.945(e).

6 The SSA's errors in handling the evidence pertaining to  
7 plaintiff's alleged mental impairments requires remand to the agency  
8 for re-evaluation in compliance with 20 CFR § 404.1520a/416.920a and  
9 20 CFR § 404.1545(e)/416.945(e).

10  
11 B

12 Next, plaintiff argues that the ALJ erred in discounting  
13 the testimony of treating physician Dr Matsumura in determining  
14 plaintiff's RFC and that he failed to set forth legally sufficient  
15 reasons for rejecting Dr Matsumura's opinion.

16 More weight is given to opinions from treating sources  
17 since these sources "are likely to be the medical professionals most  
18 able to provide a detailed longitudinal picture of [claimant's]  
19 medical impairments." 20 CFR § 404.1527(d)(2), 416.927(d)(2). The  
20 longer a treating physician has treated a claimant and the more  
21 times he has seen him/her, the more weight the SSA "will give" to  
22 that physician's opinion. 20 CFR § 404.1527(d)(2)(ii), §  
23 416.927(d)(2)(ii). When the treating physician's opinion is  
24 contradicted by another medical opinion, the ALJ must provide  
25 "'specific and legitimate reasons' supported by substantial  
26 evidence" when rejecting the opinion of a treating physician.  
27 Lester v Chater, 81 F3d 821, 830 (9th Cir 1995), quoting Murray v  
28 Heckler, 722 F2d 499, 502 (9th Cir 1983).

1 Here, the ALJ relied more heavily on the opinion of Dr  
2 Raven, a consulting examining physician, over the opinion of Dr  
3 Matsumura in the RFC determination. Dr Raven opined that plaintiff  
4 could stand and/or walk for less than two hours in an eight-hour day  
5 and could sit without restrictions. AR 129. Dr Matsumura reported,  
6 however, that plaintiff could sit for less than about six hours in  
7 an eight-hour day, must periodically alternate sitting and standing  
8 to relieve pain or discomfort and noted the possibility of a pinched  
9 nerve in the cervical region of the spine contributing to functional  
10 loss, on the strength of which he noted significant postural and  
11 manipulative limitations. AR 224.

12 The ALJ found the "symptomatic and conservative medical  
13 care" prescribed by Dr Matsumura inconsistent with the opinion that  
14 plaintiff suffered from significantly diminished functional ability  
15 and discounted the pinched-nerve theory due to lack of objective  
16 clinical findings. AR 16.

17 The reasons provided by the ALJ in discounting Dr  
18 Matsumura's opinion are not sufficiently specific and legitimate.  
19 The ALJ discounted Dr Matsumura's opinion because no other doctor  
20 mentioned the possibility of a pinched nerve, but he failed to take  
21 into account that Dr Matsumura's report was dated more than one full  
22 year after Dr Raven's, such that plaintiff's condition may have  
23 deteriorated in the time between the two examinations. Given the  
24 diagnosis of degenerative joint disease, plaintiff's RFC might well  
25 have deteriorated in the thirteen months after Dr Raven's  
26 examination. The most up-to-date examination results in the record  
27 are those by Dr Matsumura.

28 \\\

1           The ALJ also rejected Dr Matsumura's opinion partly  
2 because of the perceived inconsistency between the diagnosis of  
3 "significantly diminished functional ability" and the provision of  
4 only "symptomatic and conservative medical care." Defendant  
5 contends that Johnson v Shalala, 60 F3d 1428, 1433 (9th Cir 1995),  
6 allows an ALJ to discredit a treating physician's opinion if it is  
7 contradicted by a prescription of conservative care. Doc #14 at 5.  
8 However, Johnson does not apply here. In Johnson, the treating  
9 physician first reported that the claimant was temporarily disabled  
10 and needed only a program of conservative care. 60 F3d at 1433.  
11 Some years later the physician concluded that the claimant had been  
12 totally disabled all along. Id. The court held that the  
13 contradictions in the report allowed the ALJ to disregard the  
14 physician's opinions. Id.

15           Here, the contradiction can be explained in a manner not  
16 considered by the ALJ. Plaintiff received a certain level of care  
17 for his documented degenerative joint disease. At the April 11,  
18 2005, examination Dr Matsumura noted reduced functional ability, the  
19 possibility of a pinched nerve and a "cervical disc impairment." AR  
20 225. He also noted that "scintillating scotoma," a precursor to  
21 migraine headaches, had recently developed. Id. Dr Matsumura's  
22 report suggests a dynamic, worsening situation not inconsistent with  
23 past conservative care.

24           Substantial evidence does not support the ALJ's decision  
25 to discount Dr Matsumura's opinion. The reasons given by the ALJ  
26 are insufficient to overcome the presumption of controlling weight  
27 given to the treating physician.

28 \\\

1           When the ALJ improperly rejects the opinion of a treating  
2 physician, the opinion is credited as a matter of law. Lester, 81  
3 F3d at 834, citing Hammock v Bowen, 879 F2d 498, 502 (9th Cir 1989).  
4 The ALJ noted correctly, however, that the upper-spine pain and the  
5 functional limitations recommended because of it were of less than  
6 twelve months' duration. Therefore, this part of the opinion was  
7 excluded from the disability determination. Cf 20 CFR § 404.1512  
8 ("Unless your impairment is expected to result in death, it must  
9 have lasted or must be expected to last for a continuous period of  
10 at least 12 months.") Dr Matsumura's opinions regarding plaintiff's  
11 exertional limitations (AR 223-24) must, however, be credited for  
12 purposes of plaintiff's disability determination.

## C

15           Plaintiff maintains that the ALJ erred by not proposing a  
16 complete and accurate hypothetical to the vocational expert.  
17 Doc #13 at 9. Plaintiff argues that the VE's testimony has no  
18 evidentiary value because the hypotheticals did not include any  
19 mental limitations.

20           Hypothetical questions posed to the vocational expert must  
21 include all of the claimant's limitations and restrictions. Embrey  
22 v Bowen, 849 F2d 418, 422 (9th Cir 1988). Here, plaintiff's mental  
23 impairments were addressed by the VE during the administrative  
24 hearing, albeit only under questioning from plaintiff's attorney.  
25 The hypothetical questions posed by the ALJ only included physical  
26 limitations. Plaintiff's attorney, however, asked the VE such  
27 questions as whether an individual moderately impaired in the  
28 ability to maintain concentration, persistence or pace or with



1 modest cognitive abilities in the "borderline" range would be able  
2 to maintain employment in the four job categories and obtained  
3 answers to these questions on the record. The VE's opinion  
4 therefore has evidentiary value.

6 D

7 Plaintiff contends that the ALJ erred by not properly  
8 considering his subjective symptoms of pain and rejecting his  
9 testimony on the grounds that he was not credible. Doc #13 at 9.  
10 Plaintiff also contends that the ALJ failed to support his  
11 credibility findings with legally sufficient reasons for the  
12 disbelief. Doc #13 at 10.

13 The ALJ is required to make a full and detailed finding as  
14 to the claimant's credibility whenever it is a critical factor in  
15 the decision. Albalos v Sullivan, 907 F2d 871, 873-74 (9th Cir  
16 1990). An ALJ's rejection of a claimant's testimony on subjective  
17 complaints is valid if the findings are "sufficiently specific to  
18 allow a reviewing court to conclude" that the ALJ's decision was  
19 made on permissible grounds. Bunnell v Sullivan, 947 F2d 341, 346  
20 (9th Cir 1991) (en banc).

21 Here, the ALJ's disbelief of plaintiff's subjective  
22 complaints was based on seemingly inconsistent statements about the  
23 extent of his marijuana use and on the fact that plaintiff's last  
24 job ended when the work was completed, not because he became unable  
25 to work. AR 18. The ALJ pointed to the latter fact as an  
26 indication that plaintiff "retains some capacity for work." Id.

27 Given that the court has determined that a remand is  
28 necessary for other issues, it declines to review the ALJ's

1 determination regarding plaintiff's credibility. Plaintiff's  
2 credibility should be considered anew as appropriate for the re-  
3 determination of issues on remand.

4  
5 E

6 Finally, plaintiff argues that the ALJ erred in  
7 considering the VE's testimony on the grounds that the VE deviated  
8 from the job descriptions in the DOT. Plaintiff contends that  
9 because the VE provided jobs classified as "light" or "medium"  
10 instead of "sedentary," the ALJ erred by not providing reasons for  
11 accepting the VE's deviations. This contention lacks merit.

12 In determining whether suitable jobs exist that plaintiff,  
13 with all his impairments, can perform, the ALJ may refer to the  
14 classifications in the DOT and to testimony from an expert witness.  
15 Light v Social Security Administration, 119 F3d 789, 793 (9th Cir  
16 1997). When expert witness testimony contradicts the DOT, the ALJ  
17 may rely on the expert's testimony if there is persuasive evidence  
18 in the record to support the testimony. Johnson v Shalala, 60 F3d  
19 1428, 1435 (9th Cir 1995). In Moncada v Chater, the Ninth Circuit  
20 held "the fact that some jobs listed by the vocational expert as  
21 sedentary are also listed as 'light' work in the DOT is irrelevant,"  
22 and that vocational experts can testify whether a claimant could  
23 perform a subset of jobs at a lower level than the job's  
24 classification in the DOT. 60 F3d 521, 524 (9th Cir 1995), citing  
25 Distasio v Shalala, 47 F3d 348, 350 (9th Cir 1995).

26 The VE's testimony properly focused on the subset of jobs  
27 in each of the categories he proposed for plaintiff that could be  
28 performed at the sedentary level.

IV

"Remand for further administrative proceedings is appropriate if enhancement of the record would be useful." Benecke, 379 F3d at 593.

For the reasons stated above, plaintiff's motion for summary judgment is GRANTED, the defendant's motion for summary judgment is DENIED and the case is remanded for re-evaluation beginning at step three consistent with this opinion.

IT IS SO ORDERED.



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VAUGHN R WALKER  
United States District Chief Judge